

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**NORTHROP GRUMMAN
CORPORATION**

1840 Century Park East
Los Angeles, California 90067-2199,

Plaintiff,

v.

Civil Action No. _____

**UNITED STATES DEPARTMENT OF
THE AIR FORCE**

Air Force Material Command
4375 Chidlaw Road
Wright Patterson Air Force Base,
Ohio 45433-5001,

Defendant.

**COMPLAINT FOR
DECLARATORY AND PERMANENT INJUNCTIVE RELIEF**

Plaintiff Northrop Grumman Corporation ("Northrop Grumman"), by counsel, files this Complaint for Declaratory and Permanent Injunctive Relief against the United States Department of the Air Force ("Air Force") and states as follows:

NATURE OF THE ACTION

1. This action arises from the recent decision of the Air Force that it may release Northrop Grumman's confidential and proprietary commercial and financial information, including cost and pricing information relating to Northrop Grumman's performance under a government contract, to a competitor, Lockheed Martin Corporation ("Lockheed Martin"), pursuant to a Freedom of Information Act ("FOIA") request from Lockheed Martin. Northrop Grumman requests the Court to declare that the information in question constitutes confidential commercial and financial information that is exempt

from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4), and prohibited from disclosure by the Trade Secrets Act, 18 U.S.C. § 1905. Northrop Grumman requests the Court to permanently enjoin the Air Force from releasing the information.

PARTIES

2. Plaintiff Northrop Grumman is a Delaware corporation with its principal place of business in Los Angeles, California. Northrop Grumman serves both government and commercial customers, providing them a range of defense and technology systems, products, and solutions.

3. Defendant Air Force is an agency of the United States as defined by the Administrative Procedure Act, 5 U.S.C. § 701(b)(1). The Air Force is responsible for and controls its subordinate units and commands, including the Air Force Material Command (“AFMC”), which has its headquarters at Wright Patterson Air Force Base, Ohio.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, because the action arises under the laws of the United States, including the Administrative Procedure Act, 5 U.S.C. § 702, FOIA, 5 U.S.C. § 552, and the Trade Secrets Act, 18 U.S.C. § 1905. Northrop Grumman also invokes this Court’s authority to issue declaratory judgments under 28 U.S.C. §§ 2201-2202.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (e).

STATEMENT OF FACTS

6. Northrop Grumman is a leading global defense and technology company that provides technologically advanced, innovative products, services, and solutions to

government and commercial customers worldwide. It serves United States and international military, government, and commercial customers and is a principal defense contractor of the United States. Northrop Grumman has approximately 120,000 employees and maintains operations in all 50 states and 25 countries.

7. Northrop Grumman produces the Litening Targeting Pod System ("LTPS"), a self-contained, multi-sensor, weapon-aiming system that enables aircrews to detect, acquire, auto-track, and identify targets for delivery of both conventional and precision-guided weapons. The system's targeting and image processing technology significantly increases the combat effectiveness of the aircraft on which it is installed.

8. Northrop Grumman provides the Air Force with various models of the LTPS, as well as components of and support for those products, under Contract No. FA8607-04-D-2751 ("LTPS Contract").

9. The LTPS Contract is an indefinite delivery/indefinite quantity ("IDIQ") contract. As such, prices for the various deliverables are established pursuant to a formula in the LTPS Contract. The Air Force's obligation to place orders under the LTPS Contract is limited to a minimum, contractually-specified quantity. Additional orders during the contract period are entirely at the option of the Air Force; these orders operate as the equivalent of the exercise of price options. The LTPS Contract therefore allows the Air Force to place orders over an extended period of time as its requirements become known.

10. The LTPS Contract is still active and ongoing. Pursuant to that contract, the Air Force retains the right to place additional orders for Litening targeting pods, upgrade kits, spares, and support at the prices provided for in the contract.

11. On October 17, 2008, the Air Force received FOIA request 09-014AB from Lockheed Martin seeking (1) copies of LTPS Contract Modifications P00010 and above, and (2) all delivery orders and delivery order modifications under the LTPS Contract. Lockheed Martin manufactures and sells the Sniper Targeting pod and is one of Northrop Grumman's principal competitors in the targeting pod market.

12. In letters dated November 17, 2008, and January 22, February 26, and March 3, 2009, and a teleconference on February 27, 2009, Northrop Grumman objected to the Air Force's intended release of: (1) all pricing information relating to the LTPS Contract, including pricing for the Litening targeting pods, as well as lower-level pricing for detailed components and Line Replaceable Units ("LRUs") within the targeting pods; and (2) the Statement of Work and other information found in the requested documents that identify the details of Northrop Grumman's past and future technology development and enhancement efforts related to the LTPS. Northrop Grumman stated its belief that this information was exempted from release under FOIA's Exemption 4, 5 U.S.C. § 552(b)(4), which safeguards from disclosure "trade secrets and commercial or financial information" obtained from a non-government source when that information is "privileged or confidential," as well as the Trade Secrets Act, 18 U.S.C. § 1905.

13. In particular, Northrop Grumman's responses and supporting affidavits explained that the pricing and detailed technical information contained in the documents deemed responsive to Lockheed Martin's FOIA request is exempt from disclosure under FOIA Exemption 4, because the information could be used by Northrop Grumman's competitors to improve their own competitive bid proposals, thereby allowing the

competitors to underbid Northrop Grumman and deprive it of sales, and thus disclosure would cause Northrop Grumman substantial competitive harm.

14. The affidavits submitted by Northrop Grumman to the Air Force establish that the IDIQ LTPS Contract documents sought by Lockheed Martin include pricing information for the latest variant of the Litening pods ("Gen 4"), including historical prices for the Gen 4 pods that are the same as prices that would apply to future orders issued by the Air Force over the remaining contract period. The affidavits explain that if Lockheed Martin were to gain access to those prices, it could unfairly undercut Northrop Grumman's current IDIQ LTPS Contract price. In particular, Lockheed Martin could use Northrop Grumman's confidential and proprietary pricing data to offer to fulfill the Air Force's ordering requirements for the duration of the LTPS Contract period at a price below the existing LTPS Contract price. Such an action, the affidavits note, could either force a competition for the Air Force's requirements or entice the Air Force to fulfill its pod requirements for the remainder of 2009 with products from Lockheed Martin, rather than exercise its existing rights under the LTPS IDIQ Contract.

15. The affidavits further explain that the IDIQ ordering period for the Gen 4 Litening pods continues through December 31, 2009, and, during this period, Northrop Grumman anticipates that it will receive orders under the LTPS Contract for a substantial number of pods and upgrade kits. These sales, the affidavits explain, have an estimated value of more than \$120 million. All of those sales are threatened if Lockheed Martin and other competitors gain access to the LTPS Contract pricing information and use that information to undercut the prices in the existing LTPS Contract.

16. The affidavits further demonstrate that disclosure of historical pricing information for LTPS lower-level components and LRUs would cause Northrop Grumman additional competitive harm by impairing its ability to effectively compete in future bid competitions. As explained in the affidavits, the requested lower-level component and LRU pricing information presents an accurate reflection of the costs associated with the full targeting pod. Thus, a competitor, such as Lockheed Martin, could use cost information about the lower-level components and LRUs to develop a model to project the price of the Litening targeting pod and thereby gain a significant advantage over Northrop Grumman in future bid competitions.

17. Finally, the affidavits establish that disclosure of certain information regarding the performance and capabilities of the LTPS would cause substantial competitive harm to Northrop Grumman in future bid competitions. The affidavits note that the requested documents contain detailed information regarding new design features for the Litening Gen 4 targeting pod, including significant enhancements to the pod's sensors to improve target identification. As the affidavits state, Northrop Grumman expects the Air Force to issue a request for proposal for its Advanced Targeting Pod Sensor Enhancement (ATP-SE) program in the spring of 2009, and Northrop Grumman expects to present these new design features for the Gen 4 targeting pod as part of its competitive offering. Release of information about these performance and design features, the affidavits explain, would allow competitors to gain unfair insight into Northrop Grumman's competitive strategy and to improperly leverage this information when submitting their own bids.

18. In a notification letter dated March 18, 2009 (“AFMC Letter”), from Kenneth H. Taylor, Chief of Contracting, Air Force Material Command, to Northrop Grumman, the AFMC denied in part Northrop Grumman’s objections to the release of the pricing and detailed technical information. The AFMC stated its intent to withhold (1) “the total price of various initial spares procured for the [LTPS],” as well as (2) “[t]he quantity of spare items procured for initial spares for the LTPS.” The AFMC also agreed to redact certain technical data that would provide competitors with “specific” performance parameters of the LTPS that may be targeted in future bid competitions. The AFMC denied the remainder of Northrop Grumman’s objections, however, and approved release of all other information that Northrop Grumman had identified as exempt from disclosure pursuant to FOIA Exemption 4 and the Trade Secrets Act.

19. In an addendum to the AFMC Letter, the AFMC asserted that, despite the release of the pricing data, which included information about the Litening pod pricing, as well as lower-level LRUs and components, it would still be “difficult” for competitors to replicate the LTPS Contract’s pricing model, due to the nature of the pricing formula used by Northrop Grumman and the Air Force. The AFMC failed to respond to Northrop Grumman’s objection that its competitors may nevertheless overcome these computational hurdles to discern Northrop Grumman’s pricing model. The AFMC also failed to appreciate that competitors would be able to determine, based on the pricing data, which elements of the LRUs and lower-level component prices are unlikely to vary in future bid competitions, asserting merely that “unit prices for many items . . . will be different” in the future.

20. In response to Northrop Grumman's concern that a competitor would use Northrop Grumman's data to undercut Northrop Grumman's prices by submitting an unsolicited proposal for Litening pods, the addendum to the AFMC Letter merely stated, without further explanation, that "[s]uch a proposal would not meet the requirements of a valid unsolicited proposal that could be considered by the Government in accordance with FAR 15.603."

21. The addendum to the AFMC Letter also stated, again without explanation, that it had determined to release information regarding the performance and capabilities of the LTPS over Northrop Grumman's objection, because it did not believe the information contained "measurable performance data that a competitor could target."

22. The March 18 AFMC Letter informed Northrop Grumman that release of the specified information and documents would be withheld "for 10 business days from the date of this letter" unless Northrop Grumman obtained "a court order preventing release." The letter warned that the AFMC may choose to release the information and documents "[a]nytime after expiration of the 10 days." That 10-day period ends April 1, 2009, and so the Air Force could release the information and documents as early as April 2.

23. At all relevant times, Northrop Grumman has considered the pricing and detailed technical information sought by the FOIA request to be confidential and proprietary commercial and financial information within the meaning of FOIA, 5 U.S.C. § 552(b)(4), and has protected it as such. Northrop Grumman does not customarily make this type of information available to the public.

24. At all relevant times, Northrop Grumman has considered the pricing and detailed technical information sought by the FOIA request to be trade secrets within the meaning of the Trade Secrets Act, 18 U.S.C. § 1905, and has protected it as such.

25. Northrop Grumman will suffer irreparable harm from the release of the information at issue.

26. There will be no harm to the United States Government from protecting the information at issue against the release to the public or to a FOIA requester.

27. Protecting against the release of the information at issue will serve the public interest by fostering fair competition, particularly among contractors serving the United States Government under IDIQ contracts.

COUNT I
(FOIA EXEMPTION 4)

28. Plaintiff Northrop Grumman hereby re-alleges and incorporates by reference paragraphs 1 through 27 above as if set forth herein.

29. The information at issue is confidential commercial and financial information obtained from a person that is exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). Release of the information by the Air Force therefore is not in accordance with law under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706.

COUNT II
(TRADE SECRETS ACT)

30. Plaintiff Northrop Grumman hereby re-alleges and incorporates by reference paragraphs 1 through 29 above as if set forth herein.

31. The information at issue constitutes trade secrets under the Trade Secrets Act, 18 U.S.C. § 1905. Disclosure of the information by the Air Force is prohibited by

the Trade Secrets Act and therefore is not in accordance with law under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706.

COUNT III
(ARBITRARY AND CAPRICIOUS AGENCY ACTION)

32. Plaintiff Northrop Grumman hereby re-alleges and incorporates by reference paragraphs 1 through 31 above as if set forth herein.

33. The Air Force's decision to release the information at issue is arbitrary and capricious and an abuse of discretion under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706.

COUNT IV
(DECLARATORY JUDGMENT ACT)

34. Plaintiff Northrop Grumman hereby re-alleges and incorporates by reference paragraphs 1 through 33 above as if set forth herein.

35. This Court has authority pursuant to 28 U.S.C. §§ 2201-2202 to declare the rights of Northrop Grumman with respect to the information at issue and the Air Force's proposed actions, as follows:

- a. The information at issue is confidential commercial and financial information obtained from a person (Northrop Grumman); there is currently actual and potential competition; release or disclosure of the information likely would result in substantial competitive harm to Northrop Grumman in current and/or future domestic and international competitions for the same or similar products and services; and the information therefore is protected by FOIA Exemption 4, 5 U.S.C. § 552(b)(4), and the Trade Secrets Act, 18 U.S.C. § 1905; and

- b. The Air Force's decision to release the information at issue is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

REQUESTED RELIEF

WHEREFORE, Northrop Grumman respectfully requests the Court to:

(A) Declare that the information at issue is confidential commercial and financial information obtained from a person (Northrop Grumman), there is currently actual and potential competition, and the release or disclosure of the information likely would cause Northrop Grumman to suffer substantial competitive harm in current and/or future domestic and international competitions for the same or similar products and services, and therefore the information is protected by FOIA Exemption 4, 5 U.S.C. § 522(b)(4), and the Trade Secrets Act, 18 U.S.C. § 1905;

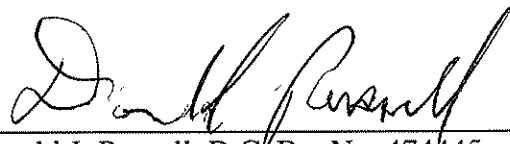
(B) Declare that the Air Force's decision to release the information at issue is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706;

(C) Permanently enjoin the Air Force and its officers, agents and employees, and those acting in concert with it, from disclosing the information at issue; and

(D) Grant such other and further declaratory, injunctive, equitable, and legal relief as may be deemed just and proper by the Court.

Dated: March 27, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Donald J. Russell". The signature is fluid and cursive, with the first name "Donald" and last name "Russell" clearly distinguishable.

Donald J. Russell, D.C. Bar No. 474445
Richard A. Sauber, D.C. Bar No. 385070
ROBBINS, RUSSELL, ENGLERT,
ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, NW, Suite 411-L
Washington, D.C. 20006
Phone: (202) 775-4500
Facsimile: (202) 775-4510

Counsel for Plaintiff
Northrop Grumman Corporation